In the Supreme Court of the United States.

OCTOBER TERM, 1899.

THE UNITED STATES, APPELLANT,
v.
THE NORTHERN PACIFIC RAILROAD Company et al. } No. 408.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF APPELLANT.

STATEMENT OF THE CASE.

Speaking generally, the case appealed is a suit involving the question whether the land grant now belonging to the Northern Pacific Railroad Company extends eastward of, or lies wholly west of Duluth, Minn.

The United States filed a bill in the circuit court for Minnesota against that company, the receivers appointed to take charge of its property, and against the Northern

Pacific Railway Company, stating their relations to a certain small tract of land in St. Louis County, *Minn.*, situated more than 10 miles east of Duluth, viz, lot 5, section 29, township 54 north, range 13 west, claimed, and on April 22, 1895, patented as within the limits of the grant made to that company by act of Congress of July 2, 1864, to aid in constructing a road from Lake Superior to Puget Sound; and proceeding to allege that Duluth is the eastern terminus or eastern initial point of the grant and road, and that the patenting of this land was by inadvertence and mistake.

It may be well to say here that Duluth is very near the extreme end of the long finger, the "*fond* du lac," of Lake Superior which points westward in the direction of Puget Sound. The same may be said of the neighboring town of Superior; and the boundary line between Minnesota and Wisconsin runs into the extreme point mentioned and separates these two towns.

The bill quoted the granting act with a view to showing its description of the grant so far as concerned the eastern end; also provisos of the act supposed to have authorized and caused the establishment of Duluth as such end by means of arrangements with a land-grant company (the Lake Superior and Mississippi) having a grant and road reaching from Thomson (a place about 20 miles west of the lake) northeasterly to Lake Superior at Duluth, under a prior granting act of Congress of May 5, 1864; and also quoted section 8 of the granting act of July 2, 1864, conditioning every grant, right, and privilege bestowed upon the completion of the road within so many years, this time, as afterwards extended,

to expire in 1878. The bill alleged the filing of a map of general route by the Northern Pacific Railroad Company in 1865 (known as the Perham map and having an erased red line to the most eastern part of the lake in Wisconsin and an unerased red line to Duluth), designating Duluth as the eastern starting point. The provisos quoted were also supposed to show that prior grants, so far as the roads were upon the same general line, were to be deducted from that to the Northern Pacific Company.

The bill further alleges the filing of the map of definite location from Fargo, Dak., as far east as Thomson on December 12, 1871, and avers that from Thomson to Duluth the Northern Pacific road was upon the same general line as the Lake Superior and Mississippi Railroad, and explains the agreements with that company (under the provisos referred to), dated, one in 1870, and two in 1872, and one in 1876 (exhibits to and parts of the bill), and the proceedings under them establishing, as the bill seeks to show, the Northern Pacific line with a terminus at Duluth.

The bill then sets forth section 3 of a prior Congressional grant of May 5, 1864, one to aid in the construction of a railroad from Portage City or other places to Bayfield, and thence to Superior, and states the definite location of that road and the withdrawal of lands for it, Superior and Bayfield being, as the court knows, on Lake Superior, in Wisconsin, and the latter city far east of Duluth and near Ashland.

The prayer of the bill was for a reconveyance of the tract, the cancellation of the patent, and for general relief.

All made parties defendant duly appeared. The Northern Pacific *Railway* Company disclaimed all past or present claim to the land and asked to be dismissed; and the other two defendants put in a "joint and several" answer.

In this answer, which is quite long, after admitting divers allegations about the receivership, the language of granting acts, and the like, they denied that the line of the Lake Superior and Mississippi from St. Paul to Duluth, by way of Thomson, is northeasterly, and say it is more northerly. That a map of general route was filed by the company in 1865 designating Duluth as the eastern starting point was denied.

The answer then, admitting the agreements alleged, denied that they had the effect of establishing Duluth as the eastern terminus and discussed them at length, seeking to show that they were the result of the provisions in the granting act requiring the company to obtain the consent of the States through which the road was to pass and of the State laws giving the consent on conditions concerning a *branch* railroad.

The answer denied that the line from Thomson to Duluth constituted part of the main line; admitted that it was used for about ten years after 1872, and alleged that it was abandoned in 1881; denied that Duluth became or was the eastern terminus or initial point; alleged that lot 5 in question was duly selected on October 5, 1894, as indemnity in lieu of certain lands within the place limits of the grant, the selection being approved on the 13th of April, 1895, and denied that the lot, though situated more than 10 miles east of Duluth, is

without the limits of the grant. The answer denied that a mistake was made in conveying the land to the company.

The answer alleged that surveys were made by the company in 1866, 1867, 1868, and 1869 of what appeared to be practicable routes, commencing at different points on Lake Superior and extending westwardly therefrom, and that prior to such surveys neither the board of directors nor officers were possessed of sufficient knowledge to determine upon a feasible route; that thereafter, and before August 13, 1870, they duly located the *general route* from the mouth of the Montreal River, on Lake Superior (a place in Wisconsin as far east as the lake reaches in that State), westward to a point on the Red River of the North, and on that date transmitted a map accordingly to the Secretary of the Interior; that he duly approved the same and ordered withdrawal of lands along the line indicated, which was done. The even-numbered sections were raised in price to $2.50 per acre, and large quantities disposed of by the United States at that price.

A *definite location* from Thomson east to a point only 8 miles west of the mouth of Montreal River is alleged, the map being transmitted to the Secretary on *July 5, 1882*, and being approved by the Commissioner of the General Land Office. This map is an exhibit and part of the answer. In 1882 and 1883 withdrawals of lands took place, including lands in Wisconsin east of Duluth.

It is further alleged that on *August 28, 1884*, the board of directors of the company adopted a resolution purporting to fix and establish "the eastern terminus or the point of beginning" at Ashland, Wis. (a place in

Wisconsin far east of Duluth and Superior); and that this was transmitted to the Commissioner of the General Land Office, who approved the same, and ordered the release from withdrawal of all lands east of Ashland; and that Ashland is on the line of definite location of July 6, 1882, about 12 miles west of the eastern end thereof.

It is alleged that the whole road from a point on Lake Superior, in Wisconsin, to wit, Ashland, to Puget Sound was "duly" constructed "in all respects as required by said act of Congress" and duly accepted by the President as provided in the granting act.

Due construction of the portion between Thomson and Ashland on the said line of definite location and examination by commissioners and approval of it in three sections are alleged—approval as far east as Bluff Creek (at Superior City, Wis.), September 16, 1882, and of the other two portions in 1884 and 1885.

The location of lot 5 within the 30-mile and beyond the 20-mile indemnity limits of the grant was alleged; that it was 10 miles east of Duluth (it was east of Superior City also, Rec., p. 98) admitted, and it was alleged that it was, with a full knowledge of the facts, selected by and conveyed to the company in accordance with the approval of the selection by the Secretary of the Interior, as indemnity in lieu of place lands lost.

It was then alleged that the Northern Pacific Railroad Company called upon the Lake Superior and Mississippi Company in 1873 for an agreement construing the agreement (mentioned in the bill) of January 1, 1872, so that the same should not be held to intend to fix the eastern

terminus at Duluth, and that thereafter in the same year the latter company, by a resolution of its board of directors, agreed with the former company that the agreement of January 1 should not be so held.

It was then alleged that in 1874 the two companies made an agreement (an exhibit to the answer) whereby the Northern Pacific Railroad Company surrendered all rights under the contract of lease of May 1, 1872, mentioned in the bill of complaint; also that the company surrendered the lines so leased.

It was denied that the relief is due the complainant; whatever was not expressly admitted or otherwise answered was denied, and the defendants declared themselves ready to aver and prove all the matters and things in their answer. There was a general replication saying that complainant would aver and prove its bill to be true and sufficient and the answer to be untrue and insufficient, wherefore the complainant prayed relief as in the bill set forth. This was followed by a stipulation as to the facts.

This statement, chiefly setting forth official documents, and the like, is extended, but simple. Its contents are for the most part shown by the index to the record referring to pages between 102 and 155, and to page 157.

The decision of the trial court was that the bill should be dismissed, and that of the court of appeals that the decree below should be affirmed without costs to either party. And the case was duly appealed to this court and ordered to be heard with that of *Andrew Doherty* v. *The Northern Pacific Railway Co. et al.*, No. 121 of the present term.

That is a case also involving a controversy as to the eastern beginning of the grant, Doherty claiming compensation for the use of his land lying east of Duluth and the company claiming to have been granted a right of way over the land while it belonged to the United States, that is, before Doherty owned it.

ASSIGNMENT OF ERRORS.

1. The court of appeals erred for the reasons stated in an assignment set forth on pages 192–194 of the record and in points number 1 to 8 italicized in the argument hereinbelow.

2. In not holding that the smallest grant reconcilable with the act of July 2, 1864, was the grant made by Congress.

3. In holding the *opposite*.

4. In not holding that constructing the road to or from the lake at Superior City exhausted the so-called power to "select an eastern terminus."

5. In not holding that that power was exhausted by so touching the lake at Duluth.

6. In holding that the company could locate road and thereby acquire title to land after the time expired for completing the road.

7. In holding that title to this indemnity land east of Duluth was, when that time expired, already in the company, subject only to a condition subsequent.

8. In holding that the executive officials were authorized to approve locations and constructions and selections of lieu lands east of Duluth, made subsequently to that

time, with the same effect as if the time had not expired, or any effect.

9. In holding that the Land Department was authorized to waive, and did waive, the rights of the Government established by Congress in the act of July 2, 1864.

10. In not holding all proceedings by the company and land officials subsequent to the time referred to (not based on previous timely proceedings) in pretended execution of that act, prohibited, void and of no effect.

11. In holding that the question of noncompliance with the terms of the grant, so far as this affects the land in question, is not in issue, but that nevertheless compliance is proven.

12. In holding that such noncompliance does not justify the decree prayed for, because the bill did not allege it.

13. In not holding that the company could not validly and effectively locate its road or eastern terminus by proceeding as authorized by the act of 1864 and without regard to the approval or disapproval of the Land Department.

14. In holding that it could do so without proceeding as authorized by the act of 1864, if the Land Department approved.

15. In not holding that the arrangements and dealings and representations with regard to Duluth and the Lake Superior and Mississippi Company's road estopped the appellees from denying that Duluth became the eastern terminus.

16. In holding that those arrangements were merely

"forming running *connections* on fair and equitable terms."

17. In holding that "its charter" gave the company the "unlimited right to choose any *eligible point* on the lake in the State of Minnesota or the State of Wisconsin."

18. In saying that we are seeking to set aside the solemn judgment of a tribunal we have entrusted with the power and given the duty "to hear and determine the very questions whether or not the corporation *was entitled* to do these acts and thereby earn these lands, *notwithstanding the fact* that the time fixed for their performance had passed," and suggesting that, if we are, we have no right to set aside such a judgment.

19. In not holding that Congress intended what would have been the grant of this tract, or lands in place opposite this tract, to be omitted from the grant made because opposite a road on the same general line having a prior grant to aid the building of a road on that general line.

ARGUMENT.

The act of Congress of July 27, 1864, made the largest of all the railroad land grants to a company owing its corporate existence to the first section of that act, and conditioned all rights, privileges, etc., upon the beginning of the road within two years, the building of 50 miles per year after the second year, and the completion of the road within so many years. As afterwards extended, the limit for completion is not claimed by the appellees to be later than 1878 or 1880. Supposing Ashland the true and only eastern end, it is not pretended

that there was a completion of the part east of Duluth before the time expired or that there was even a definite location east of Duluth before that time.

The opinion of the court is that it is true that it can correct errors of law by the Land Office; but, firstly, that the granting act intended the company to have a right to any good terminus on the lake it happened to want; secondly, that it did not lose this right by exhausting it at Duluth or Superior, for it did not select either; thirdly, that it did not lose it in 1880 under section 8 of the act, that forfeiture section requiring an act of Congress or judicial decree to forfeit or impair any of the company's rights; fourthly, that conceding a forfeiture operative from 1880, provided suit should be brought to enforce it, the Government can not recover here for that reason, because—

1. This is the wrong kind of a suit, not having been begun expressly to enforce section 8;

2. The acts of the Land Office have estopped the Government to say it has not waived section 8;

3. Nonaction, that is, failure to bring suit or pass a forfeiture law, has estopped the Government to say that;

4. The Government did waive section 8, through the acts of the Land Office, which was authorized to waive it.

We do not mean that the court expressly says that the unauthorized acts or the neglects of the officials estop the Government, but the obvious meaning seems to be the same as if it had said this.

It is settled that nonaction does not waive a forfeiture, even in the case of an individual grantor; but it is a new proposition that the Land Office (and even this court in

a suit to cancel a patent) must wait for an act of Congress or judicial decree before it can take any notice of the failure under section 8, but yet, if it takes no notice, the Land Office thereby waives the forfeiture or estops the Government from asserting it here or elsewhere.

Admittedly, then, the company is seeking to retain land it was to earn by building the road within a fixed time, which expired without compliance with that condition; that is to say, it is retaining land Congress did not agree to give or intend it to have under the present circumstances.

The appellant thus starts with the advantage that, technicalities aside, the land justly belongs to it and was not owing to the company under the contract.

The court of appeals devotes much space to a strenuous if not convincing argument to break the effect of this fundamental fact and the law arising from it—that the company failed to do those things it agreed to do in order to get or to retain the land it is seeking to deprive us of. The court sees no equity in the Government's complaint, and sees no iniquity in the long-hatching scheme of this corporation to extend its imperial domain many miles to the eastward of its legal boundary and of an all-sufficient shipping point on Lake Superior, connected by rail with Puget Sound, even if we are right in saying that boundary is to be drawn through Duluth.

In fact, the court thinks the company's wanting some more road, with a proportionately enormous quantity more of land, extremely magnanimous and meritorious. (Rec., p. 188.)

But let us pass to a discussion of details. We submit—

I.

That that construction of the granting act, not being a wholly unreasonable one, which gives the smallest grant is the true legal construction, and that construction makes the eastern boundary of it a line drawn through Duluth in Minnesota or some neighboring point in Wisconsin like Superior City.

A portion of section 1 of the granting act of July 2, 1864, is as follows:

> And said corporation is hereby authorized and empowered to lay out, locate, construct, furnish, maintain, and enjoy a continuous railroad and telegraph line, with the appurtenances, namely, beginning at a point on Lake Superior, in the State of Minnesota or Wisconsin; thence westerly by the most eligible railroad route, as shall be determined by said company, within the territory of the United States, on a line north of the forty-fifth degree of latitude, to some point on Puget's Sound, with a branch, over the Columbia River, to a point at or near Portland, in the State of Oregon, leaving the main trunk line at the most suitable place, not more than three hundred miles from its western terminus, etc.

This court has held it to be law that "when the termini of a railroad are mentioned, for whose construction a grant is made, the extent of which is dependent upon the distance between those points, the road should be constructed upon the most direct and practicable line.

No unnecessary deviation from such line would be deemed within the contemplation of the grantor, and would be rejected as not in accordance with the grant." (*St. Paul & Pac.* v. *N. Pac.*, 139 U. S., 13.)

The principle here relied upon is one often stated and applied by this court and familiarly known by Congress when this grant was made. In *Dubuque and Pac. R. Co.* v. *Litchfield* (23 How., 66), concerning a grant to Iowa to aid in the improvement of a river, we find:

> All grants of this description are strictly construed against the grantee; nothing passes but what is conveyed in clear and explicit language; and, as the rights here claimed are derived entirely from the act of Congress, the donation stands on the same footing of a grant by the public to a private company, the terms of which must be plainly expressed in the statute, and if not thus expressed they can not be implied.

This is approved in the case of *Leavenworth, etc., R. R. Co.* v. *United States* (92 U. S., 740), where the court says of a grant:

> It should neither be enlarged by ingenious reasoning nor diminished by strained construction. The interpretation must be reasonable, and such as will give effect to the intention of Congress. This is to be ascertained from the terms employed, the situation of the parties, and the nature of the grant.
>
> If these terms are plain and unambiguous, there can be no difficulty in interpreting them; but if they admit of different meanings—one of extension and the other of limitation—they must be accepted in a sense favorable to the grantor. And if rights claimed under the Government be set up against it,

> they must be so clearly defined that there can be no question of the purpose of Congress to confer them. In other words, what is not expressly given or by necessary implication, is withheld. (*Dubuque and Pac. R. Co.* v. *Litchfield, supra; Rice* v. *Railroad Co.*, 1 Black, 380; *Charles River Bridge* v. *Warren Bridge*, 11 Peters, 420.)

See also *Leighton* v. *United States* (161 U. S., 291); *Barden* v. *North. Pac.* (154 U. S., 325); *North. Pac. R. R. Co.* v. *Sanders* (46 Fed. Rep., 250); *Coosaw Mining Co.* v. *South Carolina* (144 U. S., 562); *Slidell* v. *Grandjean* (111 U. S., 437, 438); *Delaware R. R. Tax Case* (18 Wall., 225); *Whitney* v. *United States* (167 U. S., 529). In this last case, in connection, it is true, with a proposition as to the burden of proof, but doubtless having in mind the same principle, the court said:

> So long as the description is reconcilable with the smaller grant, and with a pueblo located upon the mesa of Cochiti, the Government is entitled to the benefit of that construction.

Referring to the grant in this case and the map of this Northern Pacific road to Puget around by Portland, the court says: "The authority given to the company to adopt the most eligible route did not authorize it, by a map of general route, to cover an unlimited extent of country north of the forty-fifth degree of latitude. *On the contrary*, as said in *St. Paul and Pacific R. R.* v. *Northern Pacific* (139 U. S. 1, 13), when the termini of a railroad are mentioned," repeating and applying to this grant all of the above-quoted language from that case (*United States* v. *Northern Pac.*, 152 U. S., 292).

Now, it is clear that this grant can be made larger in two ways—by bending the line of route from a straight line in search of a practicable or of a more eligible route, and secondly, and independently, by putting the termini thereof wider apart than the nearest practicable termini. If it was intended to permit it to be enlarged in the former way, that is no reason why it was also intended that it should be enlarged in the latter.

It is clear that the *terms* of the grant do not purport to authorize the latter enlargement. The grant does not say "from the most eligible railroad terminus," but merely from a point on Lake Superior.

It is also clear that the *terms* of the grant, "thence *westerly by* the most eligible railroad route," etc., can be fully complied with without permitting the termini to be farther apart than the nearest practicable termini, provided we allow a choice between the nearest practicable point in Wisconsin and the nearest in Minnesota. And, further, even if the "some point on Puget Sound" is to share in the supposedly flexible eligibility of the route, that does not prove that the eastern initial "point" was intended to be set 60 miles farther east than the most westerly practicable point.

The omission of Congress to name two places or towns on Lake Superior proves nothing against this construction, because the most western available shipping points in Minnesota and that in Wisconsin were little known in 1864.

Is there anything in "the situation of the parties" or in "the nature of the grant" to require a more extended meaning in the case of this already enormous grant?

Would not the manifest aim of the grant—to connect by rail the waters of Puget Sound with those of Lake Superior—be fully accomplished by a road "westerly" from Superior City or Duluth, the two afterwards ascertained shipping points in Wisconsin and Minnesota nearest to Puget?

If the court of appeals is right in believing it a conceivable intent of Congress that in making this particular grant Congress desired "as much railroad as possible," would it be right in affirming that to be the only interpretation, or the only reasonable interpretation, without doubt or choice as to any other?

We submit that in confining the company to ascertaining the westernmost practicable point—that is, we willingly concede, a place available for connecting with vessels, such as Superior City or Duluth, with a choice between such a place in Wisconsin and such a place in Minnesota, and thereby confining the grant to the smallest dimensions reconcilable with the act of 1864—we give this law of Congress the proper construction. In fact, there is not as much reason to say that the line of a road between fixed termini must be the most direct practicable, when it is expressly made determinable by the company or State, as there is for saying that the termini of the grant, which are simply described as a point on a named lake having a long, narrow projection to the westward and some point on a sound westward of it, without anything said about a choice of points, for eligibility or otherwise (except a choice between Minnesota

and Wisconsin), shall be the nearest practicable points, the one to the other.

The principle we have mentioned seems to render the boundary of the grant certain as calling for either Duluth or Superior City (both found to be shipping points), as the eastern limit of the grant, westerly from which it may *or may not* be that the road was intended to vary its direction in some not "unlimited" way, from the direct practicable line, to some point on Puget, so far as necessary to give the route "the most eligible" deflections.

We say may not be, because the view taken in *St. Paul and Pacific* v. *Northern Pacific*, above quoted, seems to be that the vague word "eligible" was not intended to make this road differ from those which must be upon the most direct practicable lines.

This construction seems to have been understood or agreed upon between the company's president and the Commissioner of the General Land Office prior to June 22, 1865 (Record, p. 105–106), for the Perham map had then been confined to the line to Duluth, the other line having been erased, evidently with the knowledge and consent of, if not by, President Perham, who, as president of the company was properly regarded as representing it, without our now being able to show a formal resolution directing him, no timely repudiation being shown. For the Commissioner tells the Secretary: "Mr. Perham, the president of the company, has called attention to the matter, and, submitting it, I have the honor to state * * *. Now, in this view the Commissioner reports that no withdrawals should be made

until the map of actual survey, authenticated as indicated, shall be filed in the district and General Land offices. This may be done *starting from the cul de sac of Lake Superior, the eastern initial point of the route,* and stretching thence westward to the western boundary of Minnesota, the lines of the public surveys having been that far established."

II.

That the power given to construct a road beginning at Lake Superior was exhausted when a road beginning at Lake Superior was constructed by building to the Lake at Superior City, Wis., no matter with what intention or legal opinion as to the effect of so doing, this was done, or what opinion was afterwards formed or expressed as to the effect of the act.

We shall not dwell upon the strange notion that the legal effect of an act done by the Northern Pacific Company, so far as the relations of the Government and company were changed by it, could be altered by a subsequent resolution of the same or another company, stating what that legal effect as between the Government and Northern Pacific Company was or was not.

A corporation is said to have no soul. It is an automaton, enabled to do some few acts. It exhausts its power by doing one of those acts, if the act is of the kind not intended to be repeatedly done, and we do not understand that, in the case of a physical fact, such as a railroad built or a map filed, we are to look beyond for an intent.

Suppose there was authority to go east of Superior City, if the company chose.

What the company had power to do was simply to "lay out, locate (generally and definitely), construct, furnish, maintain, and enjoy a continuous railroad and telegraph line, with the appurtenances, namely, beginning at a point on Lake Superior, in the State of Minnesota or Wisconsin, thence westerly," etc.

To construct and complete a railroad touching the authorized terminus is not to make a preliminary and tentative survey or choice of routes. It is to fully perform the final act authorized to be done in the matter of producing a railroad, and certainly more truly final than filing a map of definite location, which, as this court has held, can not be altered by the grantee company.

When it had *constructed* a road answering that description, its power to construct *was exhausted by use*. All the lower courts seem to admit the *principle* that such an authority once used is exhausted. The company was not to construct several roads from Lake Superior or a road from several points on Lake Superior, but a road from one point, meaning, we may admit, a harbor or shipping point, its touching or not touching the lake at other than such places being, therefore, a matter of no consequence.

It is quite immaterial what its private views or designs may have been, or how and when they may have changed, if corporations are supposed to have such things, concerning its so-called right "to select an eastern terminus." The final unalterable consummation of the whole project was to be the built *railroad*.

What Congress empowered it to do was to *construct a road* from Lake Superior and, *incidentally* and *preliminarily*, to lay out and locate from "a point on Lake Superior" that road which it was to construct. Unlike the companies having shorter grants, the courts have held that these Pacific road companies were not required to locate, etc., the whole road before acquiring rights. (*U. S.* v. *Southern Pacific R. R.*, 146 U. S., 596.)

As soon as the constructed road began at a point on Lake Superior and ran thence westerly, the power to construct at the eastern end, we say, was exhausted, no matter what the company then or later thought it might, could, or should do; and, of course, there remained no power to definitely locate *other road farther east*, which there remained no power to construct. The incident perished with the principal thing.

The road to Thomson from Superior City (25 miles) must have been practically, or quite, finished as soon as the map was filed, on July 5, 1882, for it was built in *1881* and 1882, and the examination of it as part of a section of 225 miles was completed and approved by September 16, 1882. It would, however, be a case of *de minimis non curat* if a few days intervened after the filing of the map (which purported to reach still farther east) before the completion of the road to Superior.

We do not mean that the power to locate at all perished, if there had been (as the record indicates with reasonable clearness) no location by map filed east of *Thompson* prior to the construction to Superior City; but that the power to locate *farther east than Superior*

City shared the fortunes of the power to construct farther east, if it ever existed, which we have just denied in point No. 1.

III.

The company was authorized to build the whole road or take in sections of it by consolidation, confederation, or assignment with or from other companies, and sections so taken in were, of course, to be regarded as much part of its line as those built by the company; therefore, when the company reached Lake Superior at Duluth, in consequence of its arrangements with the Lake Superior and Mississippi Company, the power to extend a road from a point on Lake Superior westerly was as much exhausted as if that part of its line had been built by the Northern Pacific Company.

That building and the other contemplated means of becoming able to offer the Government a railroad under the contract of the company would have the same effect in exhausting its legal authority appears to be a self-evident proposition.

The court of appeals seems to us to give a narrow construction to the provisos of the granting act little consistent with its broad construction of the rest of it and of the law of Minnesota requiring a branch road. But admitting it to be true that the act contemplated a road sufficiently controlled by the Northern Pacific Company to respond to all demands of the Government and public for transportation, yet it is obvious that "assignment" is one means of obtaining this, since in case of assignment the Northern Pacific Company itself

would be the owner and be there to respond to all demands.

But that company did get an assignment, quite sufficient for all its own and all the Government's and all the public's purposes, and thereby completed its line from a point on Lake Superior in accordance with the act of 1864 precisely as if it had built to the lake. We insist that it could not thereafter build or locate it from *another* point on Lake Superior.

There was no object in requiring the company to obtain an assignment of *all* the interest of the prior company, so far as the routes should be upon the same general line. The other company was to be a land-grant company with a road only for a short distance, perhaps, paralleling the Northern Pacific, and the Government did not want the former road to give up *all* its interests—its grants, franchises, etc.—and so incapacitate itself from running its own trains between *its* termini and carrying mails, troops, etc. The reasonable construction is that the provision was intended to make the duty of the Northern Pacific Company less onerous by authorizing it to make use of roads already built or rights already conferred, in view of the fact that the land grant was in any event to be deducted along this part of its line paralleled; and that an assignment (though not of all the grants, franchises, privileges, of the other company along that part of its line) would be authorized, if it gave the assignee a railroad along there in such way and to such extent as to be capable of performing, and directly subject to, all those obligations of the company to the

Government and to the public contemplated by the act of 1864.

And this view is strengthened by the general tenor of the proviso, mentioning as many as four different ways in which the Northern Pacific Company could get the benefit of the road contemplated by the prior granting act.

Now, an assigned ownership of the railroad or track *per my et per tout* (such as is proven) would answer all the Government's purposes as well as one simply *per tout*, and much *better*, for this would less interfere with the other land-grant company's accomplishing its own object and service to the Government and the public.

We have examined the cases cited on record, page 181 and top of page 182, in search of some objection to this point and some support for theories of the court set forth on those pages, but find nothing of either kind. The Pennsylvania case says "at or near" does not mean "at" only. The Massachusetts cases are ruled by statutes. The one in 1 Gray, at page 353, gives some English and other cases showing the law, aside from statute alteration, to be as we state it. The case in 118 U. S. and that in 143 U. S. are distinctly in our favor, and that in 171 U. S. merely says that a *private party* can not complain of an altered route over public land.

But it is suggested that all this going to Duluth was to comply with Minnesota law requiring a branch to be in that State, and that the Wisconsin law made it inexpedient to settle upon a Minnesota town like Duluth, the terminus.

Point No. 2, above, involves no dispute as to whether the company was acting under the law of 1864 or whether

what it did was in strict compliance with it, but only whether the company *could afterwards withdraw* the act and do it over again farther east than *Superior*. But here we are told there were two governments, the United States and Minnesota, authorizing, one a main and the other a branch line to the lake, and that when we see a line from Thomson to the lake at Duluth, it may be only the *branch* line and not the main line.

The consent of Minnesota to the building of the road was given with the condition that should the company "elect to make the eastern terminus of said road east of the eastern boundary of the State of Minnesota," it should construct or cause to be constructed a line of railroad from "the said main line to the navigable waters of Lake Superior."

We may remark in passing that electing or selecting an eastern terminus, branch line and main line (in the east) are phrases belonging to this Minnesota statute and all quite unknown to the act of Congress 1864.

Wisconsin shortly after gave her consent, and re-enacted and vested all the rights and powers in Wisconsin given by Congress in the Territories, and with no condition, except that no company chartered by Minnesota was "to use or enjoy any of the privileges hereby granted to the Northern Pacific Railroad Company to be exercised in the State of Wisconsin," nothing in the act to prevent the company, after building through Wisconsin, from making such contracts for connections with Minnesota roads as it deemed proper.

Inconsistently with this, it afterwards, in 1870, sought to condition its consent upon certain things to be omitted

in the way of construction in Wisconsin, passed an act, March 25, 1872, stating the "further condition" that the company should construct and maintain "to some point on the southwesterly shore of the *Bay* of Superior, between Nemadji and Connors Point, a line of railroad connecting with and continuous to the main line of said Northern Pacific Railroad, by a route running south of St. Louis River from the junction of said Northern Pacific Railroad with the Lake Superior and Mississippi Railroad, intersecting the western boundary of Wisconsin at some point between the St. Louis and Nemadji rivers, and running thence all the way in Wisconsin between said rivers, and shall also construct and forever maintain, at some place where said railroad shall touch the Bay of Superior, between the said Nemadji and Connors Point, sufficient docks," etc.

All of which meant that on March 25, 1872, it was required to build a road from Thomson, Minn., to some point at or near Superior City, Wis.

In 1870 the company had agreed to go over the Lake Superior and Mississippi to the lake at Duluth, and not to build any other road east of that railroad north of Wyoming before it completed its road to the Missouri River, and on January 1, 1872, had purchased an undivided half of the railroad of that company from Thomson to Duluth.

The recitals in the deed show clearly that any other intention than to make Duluth the lake terminus was an afterthought, whether induced by the Wisconsin law or not is unimportant. Moreover, this going to Duluth

over the L. S. and M. was not constructing or causing to be constructed a road in Minnesota, as required by the Minnesota law (unlike the Wisconsin law, Rec., p. 91), but *was* getting an assignment of interest in a road already existing as authorized by the act of Congress. Neither was there anything in the Minnesota law to require such an early "compliance" therewith, especially as the branch road was only to be built after and in case the company should elect to make its eastern terminus in Wisconsin, a question which we are now told it never fully settled until 1884.

In a case in which the facts are peculiarly within the knowledge of the defendant, slight and sometimes no evidence is required to place the burden of proof upon him. We show here striking indications of an intent to make Duluth the eastern terminus. If it is a question of intent, we show enough, and more than enough, to prove that the defendants had that intent; and what is there to overthrow this? Are the minutes of the company produced for that purpose as they are for others? Are officials, acquainted with its private books and business, sworn to show that a different intent accompanied the acts referred to? Nothing of the kind. An intent to select Ashland in 1884 is sought to be shown (no one dreamed of denying it), which intent, of course, is quite consistent with an intent to select Duluth at some long prior date. The presumption is natural and warranted by law that the knowledge peculiarly within the breasts of the defendants was carefully kept there for the reason that it rather supported than overthrew the case of the complainant.

Even if not so, must we demonstrate the private intent of this corporation beyond a reasonable doubt, or is it not to be taken as existing or not according to the preponderance of probabilities?

No strenuous opposition is made to our theory as to what was intended; but it is supposed that Duluth could be made the terminus on January 1, 1872, or sooner, and then cease to be so; or rather, the court of appeals (though not the trial court) is not satisfied with only the intent, the assignment, and the actual use of the road under it. It insists upon some kind of a ceremony, such as the resolution of the board of directors in 1884, communicated to the Secretary of the Interior. We, on the other hand, deny that even the intent makes any difference, and say that, if the act of Minnesota was complied with, what was done was no less a compliance with the act of Congress. Were it now to the interest of the company to say so, we should be at a loss for any answer to that proposition. If it filed what was a map of definite location, it could withdraw it and file another on showing that Minnesota having required it to file what would be a map of definite location within a certain time, it may possibly have been just trying to satisfy Minnesota.

The Government understood in July, 1870, that Duluth was the terminus, for it passed an act of Congress to survey the grant on the supposition that there was no doubt on that point. The fact had been notorious. The land office had understood on June 22, 1865, that Duluth was to be the terminus. The Government did not need a map of this part of the Lake Superior and Mississippi route to be furnished by the Northern Pa-

cific Company, in order to find Northern Pacific lands or deduct the amount of the other company's grant between Thompson and Duluth. Even if it had needed either, however, that would not authorize any second completing of the road farther east or any locating elsewhere than to Duluth. The granting act *required no ceremony* in the case of an assignment from an earlier grantee, no second map, no second approval of construction, nothing but to get the road by the assignment. That strip of road was, then, *pro tanto*, a complete compliance with the obligation to offer the Government and public a railroad, within the meaning of the granting law, and became at once part of the Northern Pacific road. The law did not require any approval of such assignments by anyone. In short, the court of appeals has conjured up something separate and apart from anything in the act of 1864, attended with requirements, conditions, and formalities it fails to provide for, something the court calls "the selection of an eastern terminus." This is legislating, not adjudicating. No one, of course, could add one iota to the requirements and conditions the act imposed upon the company.

We submit that the company could neither stand forever hesitating, so that the road to Duluth could be a Federal road or a State road whenever and as often as might suit the company, nor, having reached the lake at Duluth by that assignment, and especially after acting for many years as though that were the terminus, thus giving rise to many alterations in the Government's position as to land sales, surveys, etc., afterwards proceed to the lake at another point, with no better reason

than to get more business and, *if possible*, more public land.

We shall not prolong the discussion under this head by repeating the argument made below, that there was a consolidation, confederation, or association, but shall merely call attention, in passing, to the complete control which another agreement than that of January 1, 1872, gave the Northern Pacific Company over this strip of road; a control surely ample to answer all purposes of Congress without insisting upon the complete obliteration, so far as that piece of road is concerned, of any company but the Northern Pacific.

But, as already remarked, the court of appeals practically admits the facts we rely upon, and even the intent which it requires and we think utterly immaterial, merely disputing that they prevented a change of mind and the ultimate excursion to Ashland in 1884.

We say, on the contrary, that when the *acts* of the company gave to the Northern Pacific trains for one day or one hour a road "from a point on Lake Superior" to the far West, the eastern end of the Northern Pacific route was finished beyond the power of anything but Congress and the company together to alter it.

IV.

That if propositions 1, 2, and 3 are erroneous, if there was power given to locate and build east of Duluth, or to Duluth, as the company might decide, no right to lien lands east of Duluth had passed when the time limited for completing the road, being a fortiori the time limited for definitely locating the road, including termini, expired, and no right

east of Duluth (or Superior) could afterwards be acquired. To say in a law or contract that, in a certain event, all rights acquired by a party in pursuance of its authorizations are to be forfeited, is to say also that one does not intend to authorize him to go on acquiring more of the same species of rights.

There was a time limit fixed in the Northern Pacific grant, within which the road was to be finished.

That time expired before the map of definite location of July, 1882, eastward of Thomson's Junction was filed; and when it expired (1878 or 1880) the road extended no farther east than Duluth, if so far.

Is it not evident that the extreme limit of time for building the road would not have been allowed to expire without even a map of definite location east of Thompson's Junction if the company had had any faith in its supposed right to a land grant reaching all the way to the Montreal River?

Is it not evident, also, that had it been deemed necessary or advantageous to this company to show a compliance with the act of 1864 in the matter of time, the point would have been successfully made that the company, or the law for it, had chosen going to Duluth as such a compliance, or that going to Superior as early as 1881 was a compliance? And are we to say that an act of the company did not bind the company for no better reason than that the present law case finds the company arguing that it did not mean to do what it did do?

The company might very naturally, in a map of general route, go east across Wisconsin, for the reasons,

among others, that the capabilities of Superior, etc., as possible shipping points were at first not absolutely certain and because the company could lose nothing and might possibly gain by so doing.

But, aside from its own views, we submit that it was beyond the power of the company to locate the grant after the *time* for completing the construction of road expired; that, even conceding that it could have gone on to Ashland or farther, as it might see fit, it did not do so within the time limited for it to act in; wherefore it is not in the position of a grantee with title lost upon breach of condition subsequent, so far as this end of the grant is considered, but in the position of a grantee of a float, who, within a given time, could locate *the grant* to any terminal point along a lake shore, so as to make the land 10 miles long, or 15 miles long, or 20 miles long, but who, as a matter of fact, let the time for locating run out, with no pretense even of having located beyond the 10-mile terminal point. This would be true even were we discussing place limit lands, instead of lands title to which would not pass before selection and approval.

Just after the first contract with the Lake Superior and Mississippi Company about Duluth, Congress appropriated money to survey "the public lands *within the limits of the land grant to the Northern Pacific Railroad Company* in a direct line extending *from Duluth*, on Lake Superior, to Georgetown, on the Red River of the North." (Act of July 15, 1870.) And thereafter the trains of the Northern Pacific Railroad Company sped through Thomson to Duluth until after the time for completing the road expired in 1880. (We shall not pause here to

discuss the question of an estoppel caused by altering the position of the grantor as a result of what the company did, represented, and accepted between June 1, 1865 and 1882, in connection with Duluth.)

But suppose the time expired with or without a failure to complete to the lake by going to Duluth. Suppose, also, there was a grant as claimed, not certainly *going* east of Superior City, but to go east or stop there *at the option of* the grantee, can the *title* to any lands or grant east of it be said to be in the grantee, the time having expired, not simply for locating a mere float of a *certain* quantity or length, but for electing whether to go east and what distance east to go?

Shall we say that *title* to lands east of Superior City (or Duluth, if preferred), the westernmost point within the requirements of the grant, passed *in præsenti*, accompanied only by a condition *subsequent*, or shall we say that all the company ever had was a *right* to acquire lands there, if it so elected to do, which expired when the time referred to expired? And shall we say the former, when it had not even elected (as the court of appeals insists) whether it would elect a point in Wisconsin rather than one in Minnesota? Under the circumstances, were not these elections and a definite location conditions precedent, or at least prerequisites, to the vesting of *title* to lands or grant east of Superior City?

After the grantee of land, with a right to choose which land within a given time, fails to choose, and fails to perform his covenants, must he not thereafter, if he is to get anything, be content with a choice by the grantor,

which the law would presume in a case like this, especially as the lands differ chiefly in quantity, to be a choice to give the smaller tract? (See Viner's Abr. Election, § 11.)

Even in the case of an ordinary float between fixed termini, what becomes of it when the time for location has run out, so that there is no longer any power to locate?

The dicta in *Schulenberg* v. *Harriman* say nothing about the power to definitely locate, and so acquire title from the grantor, continuing after the time for constructing and completing expires. That case does not discuss how a float, or how some of the numerous and various other "grants, rights, and privileges" are (or what requires them) to be reentered, or anything but the effect of an alleged condition subsequent accompanying an alleged fee title to particular lands. It argues that, owing to old feudal doctrines about livery of seisin and investiture and the ceremony of reentry or divestiture, such a fee title, duly vested, remains vested until that ceremony of reentry is performed. But all that is no reason why an executory authority to acquire titles is not instantly ended when the time impliedly limited for exercising it expires.

Moreover, it was the author of the opinion in *Schulenberg* v. *Harriman*—a leading case on the subject of passing of title *in præsenti*, granting acts being obligatory as laws, their effect as such where a private grant would fail, etc.—who said:

> Some reference should be made here to the language used in the cases of *Deffeback* v. *Hawke* (115 U. S., 392) and *Davis* v. *Weibbold* (139 U. S., 507),

as it is contended that it is in conflict with the views expressed in the present case. If so, the writer of this opinion, who was also the writer of the opinions in both of the cases cited, must take the responsibility of any conflict with the views now expressed. *It is more important that the court should be right* upon later and more elaborate consideration of the cases than consistent with previous declarations. *Those doctrines only will eventually stand which bear the strictest examination and the test of experience.* (*Barden* v. *North. Pac.*, 154 U. S., 321.)

Is it not consistent with prior decisions of this court, that *upon definite location* title to "*place*" lands passes *in præsenti by relation* as of the date of the grant, to say that, where, under the clearly implied provisions of the grant, there ceases to be any right to locate, the float, even as to place lands, ceases to be in the grantee?

Reading the act as a whole, was not the authority to "lay out and locate," *created and given solely by the act*, clearly and *solely* intended to be authority to locate *prior* to the time when the act said an even previously duly located tract should be totally lost and forfeited?

Must not we read the act and contract as a whole (*Northern Pac.* v. *Musser-Sauntry Co.*, 168 U. S., 604) and favorably to the grantor, and does not section 8 expressly explain and limit each and every power given by the act?

Must not a man's general words, and still more a legislature's, authorizing a thing to be done be restrained and confined from including what the whole instrument shows would be something contradictory and absurd?

This point, No. 5, seems to have been overlooked by the lower court, which wholly misapprehends the rele-

vancy of section 8, namely, to throw light on and limit the meaning of the words of the *granting sections*.

Was not the declaration of the supreme law that all *right* to keep lands already gotten and to get lands or titles or rights should be forfeited a prohibition to the officers of the Land Department to do anything inconsistent therewith? (The *Peggy*, 1 Cranch, p. 103.)

Were things intended by the general words used to be authorized to be given to the company after its right to get them was intended to be at an end?

Were locations intended, by general words used, to be authorized to be approved where the authority to make them was intended to have previously ceased?

Were constructions of road?

Were rights intended to be acquired in 1882 which were also intended to be lost in 1880?

Is there any such conception under these railroad grant laws as a float no longer being a right to locate lands?

We submit that there is no such thing even as to "place" lands (the land involved in this suit being claimed as indemnity land), and that no such useless conception is suggested by the decisions of this court above referred to.

When, therefore, the time for locating this road expired the title to lands east of Superior City was in the United States, wholly unaffected by any rights of the Northern Pacific Company already acquired, and those lands were incapable of being transferred to the company under the act of 1864, except (if at all) mistakenly and improperly.

It does not diminish the force of this point No. 4 to remember that under the Guilford-Miller ruling (7 L. D.,

100; 10 L. D., 288, 440; 19 L. D., 87) the Northern Pacific Company's right to select indemnity land was not any better than a homesteader's or preemptor's right to get the same lands, less than other companies' right to select which is a mere contingent privilege at most. (*Wiscon. Cent. R. R. Co.* v. *Price*, 133 U. S., 496; *R. R. Co.* v. *R. R. Co.*, 112 U. S., 421.)

V.

If we did not in our bill point out a forfeiture as part of our proof that our land had been mistakenly patented, and so ought not to be retained by the defendants, the defendants made it part of their defense that the road was constructed "duly" and "in all respects" in accordance with the law and the acts and resolutions amending it, and that so they not only got the land because the grant did extend to it, but are entitled to retain the land because the terms of the grant were duly complied with, which our replication denied. The defendants can not say that that question is not in the case.

Let us now suppose that we are wholly wrong in points Nos. 1 to 4, inclusive, and that title to the place and indemnity grant east to Ashland vested, and could only be disturbed by a reentry or its equivalent.

The answer not only denies that the Land Office was led into error in the way alleged—that is, by erroneously believing that the land was within the eastern boundary of the grant, whereas the grant ended at Duluth, but alleges that that boundary was through Ashland; that the land was not patented in consequence of a mistake, but

rightly, and furthermore, that the company constructed its road duly and in all respects as required by the granting act. It was wholly new matter to assert that the terminus was at Ashland and the road duly completed to Ashland. Of course, if the terminus was there, it was nowhere else, and so was not west of the land in question; but it might be as far east as the land in question and yet far west of Ashland. The replication denies all this, and the proofs have been in accordance with these pleadings. But the court of appeals says that we can not have a decree in accordance with the pleadings and proofs. We began by alleging that the grant did not reach to the land, and (at least for our benefit) all pleading and proof as to any other question are to be regarded as out of the case. The company seems to have borrowed all this defense from case No. 408, which it doubtless felt confident of winning, and in which it may have had hopes of obtaining favorable rulings on these points.

We denied and deny that road built after 1880 from Superior to the land in question was "duly" constructed. (*Northern Pac.* v. *Musser-Sauntry Co.*, 168 U. S., 610.)

We are aware that it has been supposed that officials of the Land Department could go on patenting after an ordinary forfeiture of a grant located in due time and proper place (our sweeping and emphatic section 8 is more than an ordinary provision for forfeiture), for the reason that these officials were supposed to have nothing to do with enforcing such forfeiture by entry or suit.

That conclusion does not seem to follow in logic or practical sense from that premise, however. There

seems to be a middle ground, especially so far as indemnity lands are concerned, between recovering the lands forfeited and giving out patents. The Attorney-General rather than the Land Department does the former, but it would seem to be the duty of the Land Department to advise him of the facts and suggest a suit, and in the meantime no official would seem to have a right to do anything on the assumption that there was no forfeiture.

A misunderstood *dictum* in *Schulenberg* v. *Harriman* seems to be at the bottom of this strange notion.

The court of appeals, far from thinking the Land Department has nothing to do with the forfeiture, and so to be at liberty to issue titles notwithstanding its existence, takes the *opposite* view, that it is authorized to waive it. No official, we submit, however, not even the Attorney-General, who can enforce it, could waive it. Only the authority that could make the grant could thus modify it.

This court is now made aware, by the pleadings and proofs which the defendants insisted upon putting into the case, that when this patent issued there was an unwaived forfeiture of "*each* and *every* grant, right, and privilege," including the right (if it existed) to have this tract of lieu land certified.

We insist that if there is no other reason for holding that we should have what we ask for in our bill—a reconveyance—the defendants are in no position to complain should the court hold this forfeiture to be a reason that is sufficient so far as the pleadings are concerned.

Certainly, the fact that we are asking a finding only as to the right to keep one tract of lieu land and have manifested no intention of asking a forfeiture of all land and

rights and privileges whatsoever all the way from Ashland to Puget Sound, is no reason why we should be denied what we do ask for.

The rule requiring the complainant to indicate in his bill the proof intended to be offered to show that there should be a recovery in such a suit as this, is based on the idea of warning the defendant, so that he can prepare to disprove that a mistake was made. It can not require this forfeiture to have been mentioned in the bill, since it is the defendants themselves who, not content with denying that the grant did not reach as far east as the land in dispute, whether because of deduction of grant as far east as this land goes, or want of authority to begin the road so far east, or expiration of time, have brought in the proposition and evidence to prove that the land should not be recovered because of full compliance opposite the land with the granting act, confirmed by acceptances, approvals, etc.

If the case, however, is to be reduced to the *particulars* in proof of mistake as they are stated in our bill, then we wish the benefit of eliminating two-thirds of the answer and of the proofs in support of it, including divers matters which the court of appeals makes use of against us, as impertinent, incompetent, irrelevant, and immaterial.

The court of appeals had no right to say, as in effect it does, that the construction of the road in accordance with law was in issue for the benefit of the defendants, but was not in issue for the benefit of the Government. The court happened to think there had been such com-

pliance, because of the Schulenberg dictum, and it proceeds to deduce from that compliance the conclusion that we should not now recover, even though a mistake was made, and then says that we should not recover for the additional reason that *non*compliance is not in issue.

This is and was a *direct* suit by the grantor against the grantee to cancel a patent his agent had issued under a limited and conditional granting act. The defendants knew that and deemed it wise to show that they *still had* a right to the land they claimed to have gotten by reason of the grant's going eastward so as to embrace it, that is to say, that the forfeiture mentioned in the grant had not occurred and given the grantor a right to recover. That was natural, the grant in question being necessarily in the case to be construed by the court and being on its face conditional. Upon all this, the grantor, also knowing his own character in relation to the land, joined issue.

It would now be late for the defendants to say, we desire our allegations and proofs not bearing upon the proposition that the grant stopped west of the land to be stricken out of the case or ignored, now that the grantor is thereby shown to have been and to be entitled to have the land back, because the Schulenberg dictum in a case not involving a direct attack by the grantor against the grantee turns out to be a broken reed.

VI.

If the Northern Pacific Company could go to Ashland, or a point on the lake farther east, what would have been

its grant between Superior City and Ashland was deducted by the granting act; because between those places its road is upon the same general line as that part of the Portage, Winnebago and Superior Company, lying between Superior (City) and Bayfield.

What Congress meant by a road upon the same general line is clear from the general scheme contemplated by the act of 1864—that is, a road connecting the waters of Lake Superior and those of Puget Sound. Another road which could, if the companies interested so desired, form a section of a direct and practicable road between Puget Sound and Lake Superior as authorized by that act, would not fail to be on the same "general line" because the companies did not see it to their advantage to make it such a section or locate both roads on one *identical* route.

The object evidently was to avoid doubling the grant of public land in order to get a section of road which there was no advantage to the general scheme in duplicating. This object could not be accomplished if the companies were to be at liberty to locate and construct two roads *paralleling* each other at a small distance apart and then say that they were not on the same general line because they were on two routes instead of an identical one.

It is submitted, therefore, that, regarding the Northern Pacific line as a whole and as reaching from Puget Sound to a lake terminus at Ashland, a road through Superior to a lake point *near* and north of Ashland would be upon the same general line for the distance between Superior and Ashland. It was not necessary that both

should go precisely to Ashland or both to Bayfield, if both went to the *lake*—the real objective—at neighboring points.

The Northern Pacific could go to the water transportation of the lake (its eastern objective) at Bayfield, and could not, by avoiding that particular point on the lake, prevent the other road to Bayfield from being on the same general line.

The scheme would gain nothing by having one of these roads reach the lake transportation at Bayfield and the other at Ashland, and yet the public is to lose an immense area of public land because of that fact, after taking precautions to avoid just such a loss. It did not want to have, at a great cost to itself, entirely out of proportion to the distance between them, *two* points, least of all two neighboring points, on Lake Superior connected with Puget Sound.

Looked at transcontinentally, the distance between Bayfield and Ashland is very small, and the roads both go through Superior. The general line of each the court knows judicially and from the record and maps on file, and we insist that they are, within the purpose and reasonable construction of the act of 1864, on "the same general line."

The "amount of land heretofore granted" was to be deducted from the "amount granted by this act." This is obviously a question of place limit lands only, for the place limit lands are *the amount* granted, the indemnity limits being merely to make compensation for deficiencies in that amount. The two grants were of the same amounts—ten sections per mile.

The court below, as though impatiently pushing aside a last obstacle to the development of its theory of the case, says: "Upon examination of the record, however, we find it impossible to determine from the facts before us what the effect of these contentions, if sustained, would be. * * * The case has not been tried with any reference to their consideration."

And yet halfway from Superior to Ashland or Bayfield—that is, to the Brulé River—if not all the way, and to a point far east, therefore, of the tract of land in question, the two grants are practically upon the same identical line, as a glance at the maps will show. From the river to Ashland and Bayfield there are two lines, but no farther apart than direct straight lines from a common point at the river to the two termini, at Bayfield and Ashland, would be.

VII.

When a statutory grant contains on the face of the law a provision that each and every grant, right, and privilege are upon condition that the road shall be completed within a certain time, and that time expires without performance of the condition, all future proceedings of executive officers in disregard of the forfeiture are unauthorized, ultra vires, and forbidden.

The proofs clearly disclose that the condition of the grant was not complied with. We may say that the fact is boldly admitted, but that vested land titles, for feudal reasons, are said to be in no way affected thereby, and that therefore we can not recover.

In one of the latest cases before it, and a very im-

portant one (*Atlantic and Pacific R. R. Co.* v. *Mingus*, 165 U. S., 412), this court, evidently with some misgivings as to the original correctness of one of its prior holdings, remarks:

> But, while we think the practice of forfeiting by legislative act is too well settled to be now disturbed, we do not wish to be understood as saying that this power may be arbitrarily exercised. * * * The inquiry in each case is a judicial one, whether there has been, upon either side, a failure to perform, and it makes but little practical difference whether such inquiry precedes or follows the reentry or act of forfeiture. * * * So far as the road was built and accepted by the Government after that time, it (the company) was *probably* entitled to receive its appropriate land grant, *but this was rather a matter of favor* than of strict *right*. * * * The company was not in a position to demand of the Government a strict and literal performance of its obligations when it had so completely failed to meet its own.

The court wishes to be understood as having said that the forfeiture law is to be regarded not so much as a law as a mere actual going upon the land with intent to reenter, which the Government, like an individual, may mistakenly and ineffectively do, when no forfeiture has in fact occurred.

Now, we submit that while such a "favor" may be conferred by the Government, no one is authorized by this granting act to do more than carry out the act, which certainly contemplates nothing to be or be done under certain circumstances mentioned in it but the creation and enforcement of forfeiture.

Is there any general power given to the Land Office to repeal acts of Congress creating forfeitures upon the coming into existence of certain facts? If not, what officer had a right to do more than enforce the forfeiture? If any had, under what law did he get it?

How does the command of the supreme law of the land that there shall be a forfeiture become one which public officials charged with the carrying out of that law are not bound to respect? If one gives his agent conditional instructions, is he to ignore the conditions because he is not twice instructed to respect them?

We repeat, if the Government can, as a "favor" and not a right, treat the forfeiture as not having happened, or waive it, with the effect of making a further disposition of public lands, no executive officer, from the President down, is the Government for that purpose. The Constitution expressly vests the power in Congress— not to be even delegated—to dispose of the lands of the United States.

It is just and necessary (and a court of equity can not regard it as inequitable, as the court below seems to do) that everyone should be held to know the law and everyone dealing with a public officer to know the limits of the authority which the law intrusts to him, no officer, as this court held in the "Arlington Case," having any power above or beyond that which the law gives him.

The court of appeals boldly takes the view that the land department could waive the forfeiture, and in that connection confuses two quite inconsistent things—waiving rights recognized as existing and "adjudicating" that they do not exist.

VIII.

The Congress authorized the company to file a map of definite location and did not, by any law relating to homesteads, preemptions, railroad grants or by any other disposition of public land, or law relating to the care and business of the public lands, make the effectiveness of such locating, in the matter of an eastern beginning point or any other point, or of the passing of titles to place lands or right of way, or to lien lands, or in the matter of anything else, dependent upon anything but the conformity or nonconformity of the locating with the granting act itself.

The court of appeals seems to think that the company could file a map strictly in conformity with the authority conferred to lay out and locate a road, and wholly unobjectionable under a proper construction of the statute, and that it would be mere waste paper if the Land Department did not vitalize it by its approval. Hence there could be no eastern terminus established without that Department's distinct, conscious, deliberate consent.

We do not so interpret the granting act or any statute giving general or special duties to the Land Department, if any other is to be found having to do with the question the matters here in controversy having been in fact carried on always and wholly by way of executing the granting act as the sole disposition by Congress of the lands and rights claimed by the railroad company.

The court also seeks to defeat us on the ground that the Land Department had "jurisdiction" of this whole matter of an eastern terminus and to patent lands, and that it makes no difference whether it mistakenly patented

our land to one not entitled to it or consented to the establishment of the wrong terminus or not.

If there is any law whose meaning is that the Land Department shall have jurisdiction to adjudicate, whether to patent any and all public lands to any and all applicants, and decide all questions any of them may choose to raise, we are not aware of it. If Congress has transferred to executive officers its own and its successor's power to dispose of the public lands, we had not learned that. That the Land Office is charged with the business of patenting most lands Congress has by statute seen fit to dispose of, and such other "public business relating to the pubic lands" as the executive branch is charged with, is doubtless true; but we submit that there is no law under which this land could have been patented to this railroad company, or under which the administrative "tribunal" of the Land Office was given any jurisdiction to decide whether or not to patent it to this railroad company, except the granting act, as amended by the joint resolution of 1870, and that it did in fact proceed under that and no other when it certified and patented this as indemnity land.

The lower court's favorite doctrine, repeated here from what it said in the Winona and St. Peter cases, met there with no confirmation by this court, which confined itself to eliminating, in view of a long-continued executive construction, want of constructive notice of what was held in the Dunmeyer case to be a defect of title from the definition of a bona fide purchaser.

The lower court fails to note that the special tribunal is entitled to more respect when deciding what Congress

intended it should decide than when mistakenly deciding what Congress intended to decide itself, and did decide itself, intending no one else to do more than intelligently respect its decision.

The Land Office was constituted by the granting act a special "tribunal" under section 3 to determine whether or not, among the place lands *which the act granted*, certain tracts were, upon the definite location *authorized to be made within so many years*, found occupied by homestead claimants, etc.; and if so, to consider and decide whether the tract selected, it being by survey or mathematical demonstration not more than so many miles from the line of the road as so located, was free public land.

But we deny that Congress authorized that Office to consider and decide as such tribunal; and, on the contrary, assert that Congress itself decided, before it passed the act, that the grant should lie between the westernmost shipping point in Minnesota, or that in Wisconsin, and Puget Sound, or, on the other hand, might reach to the Montreal River, at the option of the company, and impliedly forbade any patenting in disregard of such its intent.

Congress not being aware that it was making a grant which had other than a certain meaning, or one which could be easily rendered certain, was not intending to create a tribunal to explain, and alter by explaining, what it was itself explaining.

The grant meant the one thing or the other, *just as though Duluth or the Montreal River had been expressly* spoken of in it; and if, as we contend, it meant the

former, as though Duluth had been expressly declared the terminus, or it had said expressly that the westernmost practicable shipping point on Lake Superior should be the terminus, then the Land Department had no more jurisdiction under section 3 to decide any question relating to lands east of Duluth or Superior (since both are now and were in 1895 to be judicially noticed as shipping points) than it had to decide whether to patent to the company lands in Texas. It being of public notoriety, and so judicially known to any court or quasi-tribunal sitting in Minnesota or Wisconsin, or hearing appeals therefrom, that this land was far east of a shipping point on Lake Superior in Wisconsin and another in Minnesota, the facts upon which in 1895 the jurisdiction intended to be given by section 3 had to arise and stand manifestly could not exist.

To this is to be added that it was well known to the land officers and the company in 1895, and notorious, that the time for expiring and for forfeiting all rights had arrived without any *definite location* east of Duluth. Without a definite location it was impossible to become entitled to lands under section 3, or to ascertain the indemnity limits, and as there could no longer be a definite location, the time had run out for jurisdiction to be exercised under section 3, if it ever could have been, so far as this land east of Duluth was to be the subject-matter of it.

Both geographically and chronologically jurisdiction under section 3, and the subject-matter thereof, failed to extend to this patenting.

And yet the supposed jurisdiction is the whole basis of the opinion of the lower court, without which it must

fall like a house of cards. It is to be noted in that connection that decisions of what the court undiscriminatingly classifies as questions of fact, even if they were so, would no more be entitled to favorable presumptions than erroneous decisions of law, if the questions of fact were *not intended by Congress to be submitted for adjudication* to the so-called tribunal.

But it may be said that there was jurisdiction to inquire whether or not there was jurisdiction, and *pro hac vice* to inquire into those questions upon which its existence or nonexistence would depend, e. g., whether or not the grant was intended to be extensible beyond this land, and whether or not after 1880 it had lost its extensible quality, and whether, if not, it had been legally located to this land. But this is not the "*pro hac vice*" question. It may also be said that *power* to *patent* much free public land being in the Secretary under some one of the various laws making disposal of public lands, in the case of a patent not showing under which it was issued, the public would have a right to assume that the patent was issued under some one of those authorizations to the Government's patenting agent, and can not be expected to make an inquiry where there would be nothing to suggest a doubt. But if this is so, obviously it does not affect our present inquiry. No such assumptions, no purchaser's rights, can control this case. Neither should we fall into the error of reasoning in a circle, so as to prove that the Land Office can patent the Capitol grounds because it has jurisdiction to inquire and decide whether they are public lands which it can patent or not.

There is a line which common sense draws about the

jurisdiction of every tribunal, and there it is rightly regarded as the intent of the lawmaker that the jurisdiction shall cease.

The court is therefore confused and confusing when it says:

> This is a suit in equity brought by the Government itself to set aside the solemn judgment and conveyance of the quasi-judicial tribunal to which it intrusted the power and on which it imposed the duty to hear and determine the very questions whether or not the corporation was entitled to do these acts and thereby earn these lands, notwithstanding the fact that the time fixed for their performance had passed.

It overlooked, among other things, *Burfenning* v. *Chicago, St. P., etc., Ry. Co.*, 163 U. S., 321. See also 7 L. Dec., 114; *Buttz* v. *North. Pac.*, 119 U. S., 73.

We submit, further, that neither any general law nor the granting act authorized the land department to control (actually or relatively to this case) the legal effect of a map of definite location or of a selection of an eastern terminus by map, construction or assignment, etc., by accepting or rejecting or deciding upon the same.

Filing was something the company was authorized to do, and its rights were to arise by operation of law the moment it filed a map or did the other things in conformity with law as to time, directness, termini, etc. The land officers could not take away those rights or prevent them from existing or *add one jot to the requirements the law imposed upon the company.*

It may be proper enough for the Secretary, without any statute authority to do so, to reject a map filed too

late or not otherwise conforming to the law, but this merely serves notice that *he* doubts the conformity of the map with the law and may refuse to do those things which *he* is given the task to do *after* the grant is lawfully located *by the company*, for example, exercise jurisdiction concerning lieu lands under section 3. But if it is, it is, and he can not alter the legal effect of the map filed. His refusal to accept it and to recognize that he has acquired jurisdiction under section 3 is simply another mistake. The map operates under the granting act in spite of him. It passes title *eo instanti* to lands and withdraws lands. By the stronger reason, if he undertakes to accept and act upon a map which is not in conformity with the statute, for example, filed too late or going to the wrong terminus, he is simply piling one mistake upon another. Title to place lands is not passed by his acceptance, and the *statute* does not, by reason of his opinion, withdraw lands.

Such mistakes do not rob either the company or the Government of its rights given and secured by the granting act and by that alone. They neither amend the law nor modify the contract, nor execute the contract.

So, in like manner, it may be proper for the President to refuse to appoint, under section 4, commissioners to examine the *mechanical construction* of road, if he thinks it is upon a wholly unauthorized line; for they are only to examine *said road*, the one authorized, and not other roads. But if it *is* upon the proper line, the company's right to confirmatory patents to lands under section 4 is not extinguished by such refusal, and so if the road,

not on an authorized line or constructed too late, is examined by the President's orders, that does not deprive the Government of its rights stipulated in the granting contract.

It is needless to add that we are presupposing that action is taken by President or Secretary as to matters arising before the time limit expires, and needless to remark that neither a map of definite location nor construction of road was to be passed upon by the land officers, even in this way, so far as the assigned road from Thomson to Duluth is concerned, and that, therefore, the question whether Duluth became the eastern terminus by or in consequence of consolidation or assignment, can not be affected by any supposed authority of the Secretary or President over locations and constructions.

For the question whether Duluth became the terminus can and should be distinguished from all others, and especially from the lately arisen question, never heard of until 1884, whether Ashland became the terminus.

If the company did what it was to do in establishing an eastern beginning by filing a map showing a line to Superior, and protracted a line beyond it, which would in law be surplusage, leaving the map to avail as far as it was good (*United States* v. *Southern Pacific R. R.*, 146 U. S., 591), or by constructing to Superior or going to Duluth by means of the Lake Superior and Mississippi, or otherwise, it is immaterial whether the Land Office (or the company, or both) thought then or later that the company could go on and touch the lake at a second shipping point. The terminus or "eastern initial point" was none the less established in the eye of the law on that

account, both absolutely and from the standpoint of this suit by the grantor against the grantee in which no third party's rights or special equities have intervened.

IX.

We have not deemed it necessary, in view of the fundamental errors herein pointed out, to lengthen this brief with a discussion of every question discussed below, but if this court views the various questions from the view point adopted by the lower court, then we reiterate the arguments shown by the court's opinion to have been made before it.

Some of the propositions upon which we are disposed to place much reliance do not seem to have been considered at all below, or, if at all, do not seem to have been looked at from the most desirable standpoints from which to judge of their force.

There are some theories, such as that of the superiority of an obtuse angle from the point at which the water of the lake stops the locating of our road, over a right angle so occasioned by the water of the Pacific, in the case of the Atlantic and Pacific road, which we do not care to argue at all.

Neither shall we discuss the question whether a vested wrong, if of great magnitude, several years old, and otherwise respectable, ought to have been disturbed by an Attorney-General, who was set in motion by a decision of Secretary Lamar, which he misunderstood, and by a belated "discovery" of another Secretary. It has been our notion that as Congress, by merely declaring that there should be an Attorney-General of the United

States, intended to borrow an office bodily from the British system of government. The office is one which involves large and responsible deciding authority in the matter of enforcing the Government's rights, and that what the court of appeals needed to inquire into, when the Attorney-General had decided to sue, was the proper way to adjudicate the case.

Since writing all of the foregoing we have received the brief of counsel for appellees filed in Nos. 121 and 408. It is a very good brief, and repeats the argument which has the merit of having convinced the lower court, viz, because things are as they are they ought to be left as they are. We had supposed, as already suggested, that the wisdom and propriety and abstract justice of canceling a patent in such a case as this was a matter submitted by law to the Attorney-General's decision and not to that of the court of appeals. The Attorney-General often listens to arguments against bringing suits of this kind, or in favor of dismissing them, and probably did so in the present instance.

For a court whose opinions guide, in unforeseeable cases, all the courts and lawyers in forty-odd States and some Territories, we do not think the argument referred to will suffice. An attorney in case No. 241 on your list for this term called our attention only yesterday to the fact, as he thinks, that our case will affect his clients and many others. Whether correctly or not, we have not examined the case carefully to see, but it seems to be supposed to involve the propriety of the ruling of the Secretary of the Interior in the famous matter of the *Northern Pacific Railroad Company* v. *Guilford Miller*

and the question whether or not a great quantity of lands west and east of Thomson, which have been given to homesteaders and preemptors, belong to the company as indemnity lands. They were withdrawn for the company as such in 1873, and in 1887 the withdrawal was held in the Guilford Miller ruling to be void *ab initio*. We mention this particular case because of what is said in the brief of the other side, at the bottom of page 18 and top of page 19, tending to show that your decision, if in favor of the company, would not give it a very great quantity of place and indemnity lands.

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